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Written statement* submitted by the Association Mauritanienne pour la Promotion du Droit, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[15 February 2016]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Roadmap for Justice in Sri Lanka

Association Mauritanniene pour la Promotion des Droits in partnership with The Sri Lanka Monitoring Accountability Panel ("MAP") was established to provide independent monitoring, advice, and recommendations on the transitional justice mechanisms in Sri Lanka, from a victims' perspective. The MAP members have considerable expertise in national and international criminal justice mechanisms designed to address wartime atrocities[1].

I. Sri Lanka's International Obligations to Victims

In 2005, the United Nations adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles"). The Basic Principles identify mechanisms, modalities, procedures, and methods for the implementation of *existing legal obligations*, including to the following:

- Equal and effective access to justice.
- Adequate, effective and prompt reparation for harm suffered.
- Access to relevant information concerning violations and reparation mechanisms.
- Effective criminal justice.

States have the duty to investigate and, if there is sufficient evidence, to prosecute persons allegedly responsible for the violations. This investigation must be done "effectively, promptly, thoroughly and impartially". Where a state's existing legal system is inadequate, it should establish special procedures with international participation, or risk violating its international obligations.

The Sri Lanka Government ("SLG") must comply with its legal obligations to victims, including the right to an effective remedy and the right to participate in proceedings.

II. Essential Ingredients for an Effective Special War-Crimes Chamber

a. Genuine Political Commitment

All past efforts by SLGs to establish accountability for wartime violations have fallen dramatically short of international standards. Accountability cannot be achieved without sustained political commitment to a properly resourced judicial mechanism that operates in accordance with *international standards*. The SLG should not use technical legal excuses to block full international judicial and prosecutorial participation. Rather, the SLG should demonstrate its commitment by adopting legislative reforms that incorporate international crimes and modes of liability, and by facilitating the appointment of international judges, prosecutors, and lawyers to work alongside local counterparts.

b. The Right Legal Framework

Legislation will have to be enacted to establish the requisite international crimes, forms of liability, and other jurisdictional powers of the special war-crimes chamber. A limited temporal jurisdiction is a pragmatic way to promote efficiency, but should not exclude the most significant crimes or be used to shield particular persons from liability. Manipulated jurisdictional time frames will undermine credibility. Defining the time frame from February of 2002 to late 2011 is a sensible option. The substantive jurisdiction should include international crimes and forms of criminal responsibility developed through the international courts, including 'command responsibility.' These provide the essential tools to prosecute those most responsible for the alleged crimes. The definition of the international crimes can

[1] MAP Members: Marie Guiraud, Peter Haynes QC, Richard J Rogers, Heather Ryan, Justice Ajit Prakash Shah. Full bios at http://war-victims-map.org/

be taken from the International Criminal Court ("ICC") Rome Statute. Since all the ICC crimes were accepted to be customary international law, these may be adopted for the purposes of prosecution in Sri Lanka.[2]
The special war-crimes chamber should limit personal jurisdiction to "those most responsible" for the crimes. Focusing on those most responsible reduces the risk that the special war-crimes chamber will become over-encumbered with lower-level perpetrators (the foot soldiers) and run out of time or money to pursue the more complex cases involving senior decision makers.

c. A Competent, Independent, and Impartial Tribunal

The Sri Lankan judicial system "remains particularly vulnerable to interference and influence by powerful political, security and military actors". Further, the Sri Lankan judiciary does not have the necessary experience to deal effectively with complex international crimes. These shortcomings are not new to post-conflict situations. The correct response is to facilitate the full participation of international judges, prosecutors, and lawyers. This participation must be significant; the foreign actors must have real decision-making powers.

The SLG has sought to narrow the meaning of 'participation' and downgrade foreign actors to 'technical advisors.' This model will not work. Advisors with no judicial decision-making authority cannot overcome the independence gaps of the domestic system. Without a significant cadre of foreign actors working alongside Sri Lankan counterparts and with real *decision-making powers*, the special war-crimes chamber is bound to fail. If the national judges remain in the majority, the court will remain open to political interference. The "supermajority" voting system has been ineffective. Therefore, each of the judicial chambers should be composed of a majority of international judges. The Constitution does not require Sri Lankan citizenship to be appointed.

The concerns relating to expertise and political interference also apply to prosecutors. Powerful suspects may seek to manipulate case selection; some of the most serious cases could be buried before they get off the ground. Therefore, it is crucial to include international prosecutors with independent decision-making powers. Equal co-prosecutors or a lead international prosecutor are sensible options. A special war-crimes chamber should permit experienced international lawyers within each defence team. There is no proscription that prevents foreign lawyers from participating.

d. Adequate Victim Participation

The Assistance to and Protection of Victims and Witnesses Act ("WPA") was an important step forward in ensuring that victims are not deprived of their remedies, including reparations. However, it falls short of the truth-seeking and accountability mandate on which the "healing and reconciliation" is premised. The WPA provides the victims with the right to initiate public action in respect of the alleged crimes by presenting, either orally or in writing, a complaint pertaining to the commission of an offence. Moreover, the right to legal representation at "several stages of the criminal proceedings" is guaranteed. However, it is not clear whether the victim has the status of a "party" or a "participant" – this should be clarified. At the ECCC, victims have the right to choose their legal counsel (foreign and national) and have a representation system that includes international lawyers working alongside national lawyers. Sri Lanka should follow this example.

e. Protection for Witnesses
The OHCHR highlighted "the absence of any reliable system for victim and witness protection, particularly in a context where the threat of reprisals is very high". The current situation in Sri Lanka is perhaps more extreme than any yet faced by a domestic war-crimes court; witness interference in Sri Lanka continues to be rife. Tamils will rightly be fearful of participating unless a rigorous witness protection system is established.

The WPA should be amended to address several shortcomings. First, neither of the two overseeing mechanisms is autonomous from the SLG. Second, the respective functions of these bodies are unclear. Third, the WPA sets out no specific criteria for the grant of protection to victims and witnesses and provides no comprehensive list of available

[2] Article 13(6) of the Sri Lanka Constitution permits prosecution of acts that were "criminal according to the general principles of law recognized by the community of nations".

protective measures. Lastly, the WPA offers no protection to witnesses who have not yet provided information in the course of an investigation.

Without amendments, the WPA will fail to reassure witnesses that they can testify safely, particularly in cases involving high-ranking police or military personnel. The SLG should formulate legal criteria based on the UN's Model Witness Protection Bill, allocate sufficient resources to the programme, and include international assistance.

III. **Recommendations**

The SLG should undertake wide-ranging consultations with all relevant stakeholders. Victims should be adequately informed of the options for justice, including a special war-crimes chamber of hybrid nature.
The SLG should protect the rights of victims outlined in the Basic Principles.
To satisfy the right to effective criminal justice, the SLG should establish a special war crimes chamber comprised of the following attributes:
a.